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November 10, 2016

Via ECFS

Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: ***Ex Parte*** **Filing of the American Cable Association:** ***Business Data Services in an Internet Protocol Environment*****, WC Docket No. 16-143;** ***Special Access Rates for Price Cap Local Exchange Carriers*****, WC Docket No. 05-25;** ***AT&T Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Service*****, RM-10593**

Dear Ms. Dortch:

On October 18, 2016, the American Cable Association ("ACA") filed an *ex parte* letter[1] reflecting discussions ACA representatives had with staff of the Federal Communications Commission ("Commission") on issues raised in the Business Data Services ("BDS") Further Notice of Proposed Rulemaking.[2] Of particular concern is language contained in the FCC's Fact Sheet that the proposed final rules will conclude that "with rare exceptions, providers, including, packet-based Ethernet providers, are common carriers."[3] ACA pointed out that the record demonstrated that the Commission had no basis to determine that all providers of business data-

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1 Letter from Thomas Cohen, Counsel to the American Cable Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 16-143 et al. (Oct. 18, 2016) ("ACA Oct. 18, 2016 Ex Parte").

2 *Business Data Services in an Internet Protocol Environment et al.*, WC Docket No. 16-143 et al., Tariff Investigation and Further Notice of Proposed Rulemaking, FCC 16-54 (rel. May 2, 2016) ("BDS FNPRM").

3 "Chairman Wheeler's Proposal to Promote Fairness, Competition, and Investment in the Business Data Services Market," FCC Headlines, (Oct. 7, 2016).

like services are providing telecommunications services as a common carrier. Moreover, ACA noted that such an overbroad declaration would, in certain circumstances, be more harmful than beneficial, deterring non-incumbent providers' future offerings of either BDS as a common carrier or business data-like services as a private carrier in competition with incumbents.[4] As part of those discussions, Commission staff requested that ACA provide additional detail about how its members were providing business data-like services as private carriers. ACA responds to that request herein.

Hundreds of ACA members, most of whom serve smaller communities and rural areas, have invested and continue to invest substantial amounts to provide BDS on a common carrier basis to commercial and institutional customers, wireless providers, and other entities. In virtually all instances, they provide these services using newly deployed fiber facilities and packet-based electronics. In all instances, they compete with the incumbent price cap local exchange carrier and often compete with numerous other non-incumbent providers. However, many ACA members provide business data-like services as private carriers, either in lieu of acting as a common carrier or apart from their provision of BDS services.

In the BDS FNPRM, the Commission is considering finding that all providers of business data-like services are offering BDS, a telecommunications service subject to Title II of the Communications Act, i.e. common carriage.[5] However, as a general matter, providers of any type of telecommunications are recognized to have the right to offer such telecommunications on a common carrier or a non-common carrier (private carrier) basis.[6] Moreover, ACA has

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4 *See* ACA Oct. 18, 2016 Ex Parte at 5-7. BDS and business data-like services may share common technologies and be offered with some of the same service level guarantees, but, as discussed herein, they are offered in materially different ways. BDS is offered indiscriminately to the public, whereas business data-like services are offered selectively, with providers choosing with whom and on what terms to deal, often in response to a particular customer's request.

5 *See* BDS FNPRM, ¶ 257.

6 *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976) (*NARUC I*). The Commission itself last year affirmed this principle in its brief before the United States Court of Appeals, explaining that broadband providers retain the ability to operate as private carriers despite the finding that mass-market broadband Internet access service should be classified as a title II common carrier service. *See* Brief for Respondents at 81, *United States Telecom Ass'n, et al., Petitioners, v. Federal Communications Commission and United States of America, Respondents*, No. 15-1063 (D.C. Cir. Sept. 14, 2015) ("USTelecom asserts that broadband providers 'have the right to elect whether to operate as private carriers or common carriers.' Br. 75. If a provider in the future decides not to make a standardized, mass market offering of broadband service to the public, but instead opts to offer service as private carriage on

explained that based on evidence already in the record, many providers of business data-like services do not hold themselves out indifferently as offering such service to the "public," i.e., to any customer that requests it.[7] These providers typically offer services to commercial customers only on a "one-off" or custom basis, often in response to requests from existing customers. Importantly, these providers do not accept requests for service from all that approach. They choose with whom to deal and on what terms.

For instance, SEMO Communications, an ACA member which serves smaller communities in Southeastern Missouri, does not advertise or otherwise make known that it would provide dedicated services to commercial customers. However, it evaluates opportunities to offer business data-like services on a case-by-case basis on those occasions when it is approached by a customer inquiring whether it can provide a solution to the potential customer's needs for dedicated broadband capabilities. Today, it has only two customers taking its private carriage business data-like service. One customer is a national wireless provider for which SEMO provides 100 Mbps dedicated Ethernet service to two cell towers under a five year agreement. Another is a prison where SEMO provides dedicated 20 Mbps Ethernet service. In each instance, the customer contacted SEMO to inquire whether SEMO could provide the service it needed, and SEMO decided to provide the service after determining that it makes both financial and operational sense to provide the requested service.

Antietam Cable, another ACA member based in Washington County, MD, which serves Hagerstown and smaller surrounding communities, also offers business data-like services on a private carrier basis and not as a common carrier. Antietam Cable explains on its website that it provides voice, pay-TV, and Internet access and related services, but nowhere does it indicate that it offers BDS or business data-like services, and it does not have a rate card for such services. Despite choosing not to actively market or otherwise make known that it would offer these services, it will provide them by agreement on customized terms as a private carrier in response to a request from local business customers who want a custom solution. Antietam operates this way because it has determined that offering dedicated broadband services generally to all potential customers in its service area is not a sound business; it believes it is critical to only provide these services where it has a viable business case.

Despite not advertising or making known they will consider offering business data-like services, SEMO and Antietam find that businesses, wireless providers, anchor institutions or others who need dedicated broadband services contact them to inquire about their availability

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individualized terms, it would no longer be offering 'Broadband Internet Access Service' as defined in the Order and would not be subject to the legal standards adopted here.").

7 *See, e.g.*, Reply Comments of the American Cable Association, WC Docket No. 16-143 *et al.*, at 14-16 (Aug. 9, 2016).

because they may already subscribe to other services or believe, for instance, that the local provider's price for providing the service would be lower than other providers.

SEMO and Antietam are each especially diligent in ensuring it has a viable business case if it receives a request for business data-like services since the provision of these services by non-incumbents is a risky proposition. They are entering the market against incumbent providers who have networks in place and relationships with most customers; they need to incur substantial and potentially highly variable costs upfront to deploy fiber facilities to customer sites; they need to obtain entry rights from building owners and others; and they need to administer their business to provide a quality experience. They also are typically asked to provide business data-like services that are not homogeneous.[8] Morever, as smaller providers that have fewer employees, many of whom are undertaking multiple jobs, these challenges are even greater. To offset this greater risk, SEMO and Antietam proceed prudently and make situation-specific decisions whether and under what conditions to deal rather than offer services indiscriminately. They want greater assurances that the provision of service to a customer will be profitable, lest it puts them out of business. If they had to operate on a common carrier basis to provide these services, they might simply choose not to provide them at all, to the detriment of their customers.

Under no circumstances can SEMO or Antietam be considered – or should either be considered – a common carrier. It is not indifferently holding itself out to offer its business data-like services to all possible customers. Moreover, the practices of Antietam and SEMO are representative of the many ACA members that have chosen to offer business data-like services on a private carriage basis.

Finally, by forcing ACA members and other providers of business-data-like service to be common carriers, the Commission will inhibit entry or the provision of service by providers to additional customers. Title II includes many regulatory requirements that impose significant costs on providers.[9] Should Antietam, SEMO, and other non-incumbent providers have to incur

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[8] As the Commission explains, these services have "distinct service requirements" to serve different "customer groups." *See* BDS FNPRM, ¶ 199. These services come with "substantial reliability guarantees and functionality" that are tailored to individual customers. *See id*., ¶ 194 (where the Commission discusses at length Sprint's special requirements for its wholesale Ethernet service). *See also id*., ¶ 200. Providers also often need to tailor a package of services to meet the particular needs of customers to connect at different sites and price the package based on their operational costs and whether capital or other expenditures are involved to obtain ability to provide the service.

[9] One can gain an appreciation of the burdens that would be imposed on a provider by being subject to Title II common carrier obligations by examining the Commission's *2015 Open Internet Order*. *See Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, 30 FCC Rcd 5601, paras. 37, 434 (2015), *pets.*

these costs to provide business data-like services, it would have a chilling effect on providing service, including to wireless providers seeking to extend 4G LTE services in rural areas and initiate 5G services. The inability to act as a private carrier also would inhibit a smaller provider's ability to initiate business data-like service, learn the business, and decide whether to invest in additional network facilities. Finally, there is no evidence in the record that imposing common carriage obligations on all non-incumbents is beneficial or otherwise warranted.

In addition to the important public policy rationale for giving non-incumbents the ability to choose how they provide service, as a legal matter, the Commission cannot override a carrier's intent to operate as a private carrier simply to further some public interest objective. Only where telecommunications is offered where the provider has market power might the Commission consider requiring that it be offered on a common carrier basis.[10] But even in that situation, the Commission has not been quick to do so, which underscores the high hurdle the Commission would face. Moreover, as a threshold matter, ACA and others have demonstrated that, in non-competitive markets, non-incumbent providers do not have market power in the provision of BDS, and it is not justifiable to impose pricing regulation on them should they choose to offer their service on a common carrier basis. It follows that it would be even less justifiable to require all business data-like offerings be made on a common carrier basis in both competitive and non-competitive markets without regard for whether a provider has market power.

The Commission's long-standing light touch regulatory treatment of non-incumbent providers of BDS and business data-like services has been a resounding success. Many hundreds

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for review pending sub nom United States Telecom Ass'n, et al., Petitioners, v. Federal Communications Commission and United States of America, Respondents, No. 15-1063 (D.C. Cir. May 22, 2015). In this decision, the Commission explained that, even though key, substantial requirements of Title II would remain in effect, including the rate regulation and complaint provisions of Sections 201, 202, and 208, "its forbearance approach results in over 700 [Title II related] codified rules being inapplicable," which would minimize burdens on broadband providers. *2015 Open Internet Order*, ¶ 37. Of course, should the rate regulation and complaint provisions be added into this Title II mix, providers, especially smaller providers, would burdened far more substantially. In addition, common carriers, depending on circumstances, are subject to numerous reporting requirements and obligations under the Commission's Rules that private carriers are not, for example, Common Carrier Annual Employment Report and Discrimination Complaint Requirement (FCC Form 395), Local Telephone Competition and Broadband Reporting (FCC Form 477), Numbering Resource Utilization Forecasts (Form 502), Section 64.1900 Geographic Rate Averaging Certifications, Section 64.2009 Customer Proprietary Network Information (CPNI) compliance reporting and annual CPNI certification, Section 4.1 Network Outage reports**,** and Section 64.2400 Truth-in-Billing compliance obligations.

[10] *See NARUC I*, 525 F.2d 630.

of non-incumbent providers have entered the market, invested substantial amounts to build network facilities to offer tailored, innovative services, and brought competitive alternatives to once closed markets – and these trends are certain to continue. Accordingly, the Commission should not determine that all providers of business data-like services are providing telecommunications services. Rather, if there is reason to believe a professed private carrier is acting as a common carrier and not adhering to an applicable common carrier regulation, the classification question can be addressed on a case-by-case basis, examining the facts of the individual provider's offering.[11] ACA also suggests the Commission indicate that it will be reluctant to hear complaints brought against smaller providers of business-data like services – or even BDS – unless there is clear and convincing evidence given the costs of participation in such a proceeding would tax the resources of these providers.

This letter is being filed electronically pursuant to Section 1.1206 of the Commission's rules.

Sincerely,

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[11] Assuming the Commission unwisely rejects ACA's position on private carriage and seeks to act contrary to precedent, it should at least permit providers not offering BDS as a common carrier and only offering business data-like services as a private carrier to continue to offer service in this manner. It also should grandfather existing private carriage offerings from any provider.